

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Gray Television Licensee, LLC)	MB Docket No. 16-293
)	
For Modification of the Satellite Television Market)	CSR No. 8926-A
For WSAW-TV, Wausau, Wisconsin)	
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)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 2017

Released: January 17, 2017

By the Chief, Media Bureau

I. INTRODUCTION

1. Gray Television Licensee, LLC (“Petitioner” or “Gray”), filed the above-captioned Petition seeking to modify the local satellite carriage television market of WSAW-TV, Wausau, Wisconsin (Facility ID No. 6867) (“WSAW” or the “Station”) to include two communities in Wisconsin—Iron County and Ashland County—that are currently assigned to the Duluth-Superior Designated Market Area (DMA).¹ A consolidated Opposition to the Petition was filed by WDIO-TV, LLC and KQDS Acquisition Corp. (“WDIO/KQDS”).² In addition, DISH Network LLC (“DISH”) has filed a certification claiming carriage of the Station is infeasible in both Iron and Ashland Counties,³ and AT&T/DIRECTV, LLC (“DIRECTV”) has filed a certification stating that carriage of the Station is feasible in Iron County and in five ZIP codes in Ashland County, and infeasible in seven ZIP codes in Ashland County.⁴ For the reasons discussed more fully below, we grant in part and deny in part Gray’s Petition. We find that DISH has not met its burden to demonstrate technical or economic infeasibility, but that DIRECTV has done so with respect to seven Ashland ZIP codes. We also find that the evidence weighs in favor of the expansion of WSAW’s market to include Iron and Ashland Counties. We therefore modify WSAW’s market with

¹ Petition for Special Relief of Gray Television Licensee, LLC, MB Docket 16-293 (filed Sept. 7, 2016) (Gray Petition for Special Relief), <https://www.fcc.gov/ecfs/filing/109072037422933>. The Media Bureau placed the Petition on public notice on September 16, 2016. *Special Relief and Show Cause Petitions*, Public Notice, Report No. 0446 (MB Sept. 16, 2016) (*Gray Petition for Special Relief Public Notice*).

² Opposition to Petition for Special Relief of WDIO/KQDS, MB Docket 16-293 (filed (October 20, 2016) (WDIO/KQDS Opposition).

³ DISH Feasibility Certification, MB Docket No. 15-71 (filed August 19, 2016) (DISH Feasibility Certification); DISH Network Response to FCC Data Request, MB Docket 16-293 (filed Dec. 6, 2016) (DISH Dec. 6, 2016 Response); DISH Network Response to WSAW Questions, MB Docket 16-293 (filed Dec. 2, 2016) (DISH Dec. 2, 2016 Response).

⁴ DIRECTV Response to Petition for Special Relief, MB 15-71 (filed Oct. 18, 2016) (DIRECTV Oct. 18, 2016 Response); DIRECTV Response to Staff Inquiries, MB Docket 16-293 (filed Dec. 2, 2016) (DIRECTV Dec. 2, 2016 Response).

respect to DISH to include both Iron and Ashland Counties, and with respect to DIRECTV to include Iron County and five ZIP codes in Ashland County.⁵

II. BACKGROUND

2. Section 338 of the Communications Act authorizes satellite carriage of local broadcast stations into their local markets, which is called “local-into-local” service.⁶ A satellite carrier provides “local-into-local” service when it retransmits a local television signal back into the local market of that television station for reception by subscribers.⁷ Generally, a television station’s “local market” is defined by the Designated Market Area (DMA) in which it is located, as determined by the Nielsen Company (“Nielsen”).⁸ DMAs describe each television market in terms of a group of counties and are defined by Nielsen based on measured viewing patterns.⁹ Pursuant to Section 338, satellite carriers are not required to carry local broadcast television stations; however, if a satellite carrier chooses to carry a local station in a particular DMA in reliance on the local statutory copyright license,¹⁰ it generally must carry any qualified local station in the same DMA that makes a timely election for retransmission consent or mandatory carriage.¹¹

3. The STELA Reauthorization Act of 2014 (STELAR) added satellite television carriage to the Commission’s market modification authority, which previously applied only to cable television carriage.¹² Market modification, which long has existed in the cable context, provides a means for the Commission to modify the local television market of a commercial television broadcast station and thereby avoid rigid adherence to DMAs. Specifically, to better reflect market realities, STELAR permits the Commission to add communities to, or delete communities from, a station’s local television market for purposes of satellite carriage, following a written request. In the Commission’s 2015 *STELAR Market Modification Report and Order* implementing Section 102 of the STELAR, the Commission adopted satellite television market modification rules that provide a process for broadcasters, satellite carriers, and county governments to request changes to the boundaries of a particular commercial broadcast television station’s local television market to include a new community located in a neighboring local market.¹³ The

⁵ DIRECTV states that carriage of WSAW is feasible in the following five ZIP codes in Ashland County: 54514, 54527, 54546, 54557, and 54559. *Id.* at 2.

⁶ 47 U.S.C. § 338(a)(1).

⁷ 47 CFR § 76.66(a)(6).

⁸ See 17 U.S.C. § 122(j)(2); 47 CFR § 76.66(e) (defining a television broadcast station’s local market for purposes of satellite carriage as the DMA in which the station is located).

⁹ The Nielsen Company delineates television markets by assigning each U.S. county (except for certain counties in Alaska) to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, Nielsen includes both over-the-air and multichannel video programming distributor (MVPD) viewing.

¹⁰ 17 U.S.C. § 122. Satellite carriers have a statutory copyright license under the 1999 Satellite Home Viewer Improvement Act (SHVIA) for carriage of stations to any subscriber within a station’s local market. See Satellite Home Viewer Improvement Act of 1999 (SHVIA), Pub. L. No. 106-113, 113 Stat. 1501 (1999).

¹¹ See 47 U.S.C. § 338(a)(1); 47 CFR § 76.66(b)(1). This is commonly referred to as the “carry one, carry all” requirement.

¹² The STELA Reauthorization Act of 2014, § 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (STELAR) (adding 47 U.S.C. § 338(l)). “STELA” refers to the Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175.

¹³ *Amendment to the Commission’s Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014*; MB Docket No. 15-71, Report and Order, 30 FCC Rcd 10406 (2015) (*STELAR Market Modification Report and Order*) (revising 47 CFR § 76.59). A community is defined as a county for purposes of the satellite market modification rules. 47 CFR § 76.5(gg)(2).

rules enable a broadcast television station to be carried by a satellite carrier in such a new community if the station is shown to have a local relationship to that community.

4. By extending the market modification process to satellite television, Congress, in part, sought to address the so-called “orphan county” problem. An orphan county is a county that, as a result of the structure of a local satellite market, is served exclusively, or almost exclusively, by television stations coming from a neighboring state.¹⁴ Satellite television subscribers residing in an orphan county often are not able to access their home state’s news, politics, sports, emergency information, and other television programming. Providing the Commission with a means to address this problem by altering the structure of, and therefore the stations located within, a local market was a primary factor in Congress’s decision to extend market modification authority to the satellite context.¹⁵

5. Section 338(l) of the Act, added by the STELAR, creates a satellite market modification regime very similar to that in place for cable television, while adding provisions to address the unique nature of satellite television service, particularly issues of technical and economic feasibility that are specific to the satellite context.¹⁶ Notably, the STELAR carves out an exception to carriage obligations¹⁷ resulting from a market modification that would be technically or economically infeasible for a satellite carrier to implement. The statute provides that a market modification “shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination.”¹⁸ In enacting this provision, Congress recognized that the unique nature of satellite television service may make a particular market modification difficult for a satellite carrier to effectuate using its satellites in operation at the time of the determination and thus exempted the carrier from the resulting carriage obligation under those circumstances.¹⁹ This exception applies only in the satellite context. In the cable context, if review of the factors and other evidence demonstrates that a community is part of a station’s market, the modification is granted without reference to issues of technical and economic feasibility.²⁰

6. Once the threshold issue of technical and economic feasibility is resolved, Section 338(l) provides that the Commission must afford particular attention to the value of localism in ruling on requests for market modification by taking into account the following five factors:

- (1) whether the station, or other stations located in the same area—(a) have been historically carried on the cable system or systems within such community; and (b) have been historically

¹⁴ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10408, para. 3.

¹⁵ See generally Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 (2014) (*Senate Commerce Committee Report*).

¹⁶ See 47 U.S.C. §§ 338(l), 534(h)(1)(C) (providing factors the Commission must take into account when considering satellite market modification requests). The Commission may determine that particular communities are part of more than one television market. 47 U.S.C. § 338(l)(2)(A). When the Commission modifies a station’s market to add a community for purposes of carriage rights, the station is considered local and is covered by the local statutory copyright license and may assert mandatory carriage (or pursue retransmission consent) by the applicable satellite carrier in the local market. Conversely, if the Commission modifies a station’s market to delete a community, the station is considered “distant” and loses its right to assert mandatory carriage (or retransmission consent) on the applicable satellite carrier in the local market.

¹⁷ See *supra* note 11 and accompanying text (describing the “carry one, carry all” satellite carriage requirement).

¹⁸ 47 U.S.C. § 338(l)(3)(A).

¹⁹ *Senate Commerce Committee Report* at 11 (recognizing “that there are technical and operational differences that may make a particular television market modification difficult for a satellite carrier to effectuate.”).

²⁰ As explained in the *STELAR Market Modification Report and Order*, Congress recognized “the inherent difference between cable and satellite television service” by adopting certain “provisions specific to satellite,” including 47 U.S.C. § 338(l)(3)(A)’s feasibility exception. 30 FCC Rcd at 10408, n.6.

- carried on the satellite carrier or carriers serving such community;
- (2) whether the television station provides coverage or other local service to such community;
- (3) whether modifying the local market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence;
- (4) whether any other television station that is eligible to be carried by a satellite carrier in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
- (5) evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.²¹

The five statutory factors are not intended to be exclusive. Each factor is valuable in assessing whether a particular community should be included in or excluded from a station's local market. The importance of particular factors will vary depending on the circumstances of each case. The Commission may also consider other relevant information.²²

7. Significantly, in the *STELAR*, Congress added the new statutory factor three quoted above, requiring consideration of access to television stations that are located in the same state as the community considered for modification.²³ This new factor and the legislative history reflect Congress's intent to promote consumer access to in-state and other relevant television programming. Indeed, the legislative history expresses Congress's concern that "many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances," may "lack access to local television programming that is relevant to their everyday lives" and indicates Congress's intent that the Commission "consider the plight of these consumers when judging the merits of a [market modification] petition ..., even if granting such modification would pose an economic challenge to various local television broadcast stations."²⁴

8. In the *STELAR Market Modification Report and Order*, the Commission determined that a satellite market modification petition must include specific evidence describing the station's relationship to the community at issue. This standardized evidence approach was based on the existing approach for cable market modifications.²⁵ Accordingly, the rules require that the following evidence be submitted:

- (1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend or satellite carrier local receive facility locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market;
- (2) Noise-limited service contour maps delineating the station's technical service area and showing the location of the cable system headends or satellite carrier local receive facilities and communities in relation to the service areas;

²¹ 47 U.S.C. § 338(l)(2)(B)(i)-(v).

²² 47 U.S.C. § 338(h)(1)(C)(ii) directs the Commission to "afford particular attention to the value of localism by taking into account *such factors as*" those described above (emphasis added). The Commission must also consider other relevant information, however, when necessary to develop a result that will "better effectuate the purposes" of the law. See 47 U.S.C. § 338(l)(1); *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, CS Docket No. 95-178, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366, 8389, para. 53 (1999) (*Cable Market Modification Second Report and Order*).

²³ See 47 U.S.C. §§ 338(l)(2)(B)(iii), 534(h)(1)(C)(ii)(III).

²⁴ *Senate Commerce Committee Report* at 11.

²⁵ See *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421-22, para. 20.

- (3) Available data on shopping and labor patterns in the local market;
- (4) Television station programming information derived from station logs or the local edition of the television guide;
- (5) Cable system or satellite carrier channel line-up cards or other exhibits establishing historic carriage, such as television guide listings;
- (6) Published audience data for the relevant station showing its average all day audience (*i.e.*, the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both multichannel video programming distributor (MVPD) and non-MVPD households or other specific audience information, such as station advertising and sales data or viewer contribution records; and
- (7) If applicable, a statement that the station is licensed to a community within the same state as the relevant community.²⁶

Petitions for special relief to modify satellite television markets that do not include the above evidence will be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee.²⁷ Parties may submit whatever additional evidence they deem appropriate and relevant.²⁸

9. In the instant proceeding, Gray filed a Petition on September 7, 2016 seeking modification of the local television market of WSAW to include Iron County and Ashland County, Wisconsin. The Petition was placed on public notice on September 16, 2016.²⁹ During the pre-filing coordination process, the satellite carriers each filed Feasibility Certifications. DISH's certification claims that carriage of the Station is infeasible in both Iron and Ashland Counties because of the costs associated with changes to customer satellite dishes and equipment to accommodate reception from different orbital locations. DIRECTV's certification claims that carriage of the Station is infeasible in seven ZIP codes in Ashland County due to insufficient spot beam coverage. We received one joint opposition filed by WDIO/KQDS.³⁰ We also received seven comments in support of the Petition, including from government officials who represent the affected area.³¹ The Commission must make two determinations: (1) whether the Petition demonstrates that a modification to the Station's television market is warranted, based on the five statutory factors and any other relevant information; and (2) whether the resulting carriage of the Station from the proposed market modification is technically and economically feasible for each of the satellite carriers.³² We consider the latter question first, because we will not grant a market modification petition if the resulting carriage would be infeasible.³³

²⁶ 47 CFR § 76.59(b)(1)-(7).

²⁷ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10424, para. 22.

²⁸ *Id.*

²⁹ Special Relief and Show Cause Petitions, Public Notice (MB September 16, 2016). The deadline for pleadings was set for October 6, 2016. The Commission granted an extension for pleadings on October 5, 2016, setting a new Opposition deadline of October 20, 2016 and a reply deadline of October 31, 2016. *Gray Television Licensee, LLC For Modification of the Television Market For WSAW-TV, Wausau, Wisconsin Facility Identification Number 6867*, MB Docket 16-293, Order, 31 FCC Rcd 11009 (MB 2016).

³⁰ WDIO/KQDS Opposition (October 21, 2016).

³¹ Michael Smith Comments; Donald E. Peterson Comments; Donald B. Mowbray Comments; Gerold Hammen Comments; Clerk Michael Saari Comments; Senator Ron Johnson Comments; Michael Smith Response.

³² 47 U.S.C. § 338(l); *see also* 47 CFR § 76.59.

³³ *See STELAR Market Modification Report and Order*, 30 FCC Rcd at 10442, para. 50.

III. DISCUSSION

10. For the reasons set forth below, we find that the evidence weighs in favor of the expansion of WSAW's market to include Iron and Ashland Counties. We conclude that DISH must offer the Station throughout the Counties, and DIRECTV must do so except in the seven identified Ashland County ZIP codes where such service would be infeasible.³⁴

A. Technical and Economic Feasibility

11. We find that DISH has not met its burden to demonstrate technical or economic infeasibility, but that DIRECTV has done so with respect to seven Ashland ZIP codes. Section 338(l)(3) of the Communications Act does not require a satellite operator to carry a station in response to a market modification if it is not technically and economically feasible for the carrier to accomplish the carriage by means of its satellites in operation at the time of the determination.³⁵ In the *STELAR Market Modification Report and Order*, the Commission concluded that the satellite carrier has the burden to demonstrate that the resulting carriage from a market modification is infeasible.³⁶ The Commission requires different demonstrations of infeasibility depending on whether the claim of infeasibility is based on insufficient spot beam coverage or some other basis.³⁷

12. Satellite carriers use spot beams to offer local broadcast stations to targeted geographic areas.³⁸ With respect to claims of "spot beam coverage infeasibility," the Commission concluded that "it is *per se* not technically and economically feasible for a satellite carrier to provide a station to a new community that is, or to the extent to which it is, outside the relevant spot beam on which that station is currently carried."³⁹ The Commission allows satellite carriers to demonstrate spot beam coverage infeasibility by providing a detailed and specialized certification, under penalty of perjury.⁴⁰

³⁴ See *infra* note 44 (identifying the ZIP codes DIRECTV determined were incapable of receiving service from the spot beam on which it carries WSAW).

³⁵ 47 U.S.C. § 338(l)(3) (A "market determination ... shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination."). See also 47 CFR § 76.59(e).

³⁶ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10435, para. 38 (observing that, as a practical matter, only the satellite carriers have the specific information necessary to determine if the carriage contemplated in a market modification would not be technically and economically feasible by means of their satellites in operation).

³⁷ *Id.* at 10435-6, 10438, paras. 39, 42.

³⁸ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10430, n.162 (quoting DIRECTV to explain that "[s]pot-beam technology divides up a portion of the bandwidth available to a satellite into beams that cover limited geographic areas. Doing so allows particular sets of frequencies to be reused many times. This spectral efficiency unlocked the potential for satellite carriers to offer local broadcast signals in the late 1990s, and it enables satellite carriers to offer local service today." This is in contrast to a "CONUS" beam, which provides coverage to the entire continental United States and generally carries signals that are available and accessed by subscribers throughout that entire area).

³⁹ *Id.* at 10410429-30, para. 30. This is because the only available options to implement the market modification would be: (1) to put the signal on the satellite provider's CONUS beam (using spectrum that could otherwise be deployed for signals available to subscribers throughout the entire continental U.S.); (2) to reorient existing spot beams (which are already oriented to most efficiently serve the largest number of subscribers); or (3) to carry the same signal on an additional spot beam (using twice as much overall spectrum for the channel at issue as for other channels, which are carried on a single spot beam whenever possible). The Commission found each of these options infeasible. *Id.* at 10431-32, para. 32.

⁴⁰ *Id.* at 10435-36, para. 39. The Commission requires satellite carriers claiming that a market modification is technically infeasible based on spot beam coverage to submit a detailed certification that must include the following: (1) an explanation of why carriage is not technically and economically feasible, including a detailed explanation of the process by which the satellite carrier has determined whether or not the spot beam in question covers the

(continued....)

13. With respect to other possible bases for a carrier to assert that carriage would be technically or economically infeasible, such as costs associated with changes to customer satellite dishes to accommodate reception from different orbital locations, the Commission determined that it will review such assertions on a case-by-case basis.⁴¹ To demonstrate such infeasibility, the Commission requires carriers to provide detailed technical and/or economic information to substantiate its claim of infeasibility.⁴²

14. DIRECTV and DISH each filed Feasibility Certifications in response to Gray's Petition, with DIRECTV claiming partial infeasibility in Ashland County due to insufficient spot beam coverage⁴³ and DISH claiming total infeasibility in both Ashland and Iron Counties because of the costs associated with changes to customer satellite dishes and equipment to accommodate reception from different orbital locations.⁴⁴ We address each claim in turn.

1. DIRECTV Infeasibility Claim

15. We find that DIRECTV's infeasibility claim is adequately supported. DIRECTV claims that carriage of WSAW is infeasible in seven ZIP codes in Ashland County due to insufficient spot beam coverage.⁴⁵ Specifically, DIRECTV certifies, under penalty of perjury, that it conducted an analysis with respect to the ability of the spot beam on which it carries WSAW to serve every ZIP code in Iron and Ashland Counties, that the analysis was conducted "in substantially the same manner and using substantially the same parameters used to determine the geographic area in which it currently offers stations carried on the spot beam," and that it is unable to provide service in these seven ZIP codes "because reception of the signal [in those ZIP codes] does not meet the minimum performance thresholds for DIRECTV's service."⁴⁶ DIRECTV does not otherwise oppose Gray's Petition and states that carriage of WSAW is feasible in all of Iron County and in the other ZIP codes in Ashland County.⁴⁷ We find that DIRECTV's certification meets the Commission's requirements for a detailed certification, because it provides an explanation of the process it used to determine that the seven ZIP codes had insufficient spot beam coverage, states that it used the same process it had used to determine the current geographic coverage of the beam, and declares the truth of those statements under penalty of perjury.⁴⁸ We find that

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geographic area at issue; (2) a statement that the satellite carrier has conducted this analysis in substantially the same manner and using substantially the same parameters used to determine the geographic area in which it currently offers stations carried on the spot beam in question; and (3) a supporting affidavit or declaration under penalty of perjury, as contemplated under Section 1.16 of the Commission's Rules and 28 USC § 1746, signed and dated by an authorized officer of the satellite carrier with personal knowledge of the representations provided in the certification, verifying the truth and accuracy of the information therein. *Id.* at 10437-8, para. 41.

⁴¹ *Id.* at 10438, para. 42.

⁴² *Id.*; see also *id.* at 10434-35, para. 36 (requiring satellite carriers to demonstrate infeasibility for reasons other than insufficient spot beam coverage "through the submission of evidence specifically demonstrating the technical or economic reason that carriage is infeasible").

⁴³ DIRECTV Feasibility Certification, MB Docket 15-71 (filed August 15, 2016).

⁴⁴ DISH Feasibility Certification, *supra* note 3.

⁴⁵ DIRECTV Feasibility Certification at 4; DIRECTV Oct. 6, 2016 Response at 1-2 (certifying that the spot beam on which it carries WSAW does not serve the following seven ZIP codes in Ashland County: 54517, 54806, 54846, 54850, 54855, 54856, and 54861). Unlike in the DISH situation discussed immediately below, DIRECTV certification indicates that none of its satellites in operation are capable of providing adequate coverage to subscribers in these ZIP codes.

⁴⁶ DIRECTV Feasibility Certification at 2.

⁴⁷ DIRECTV October 6, 2016 Response at 1-2.

⁴⁸ See *supra* note 39 (discussing the required content for a detailed certification).

it therefore sufficiently demonstrates spot beam coverage infeasibility with respect to the seven Ashland ZIP codes specified in its certification. We find that DIRECTV's carriage of the Station in Iron and Ashland Counties is otherwise feasible.

16. In doing so, we reject Gray's argument that DIRECTV's certification is insufficiently detailed to meet the Commission's requirements.⁴⁹ In the *STELAR Market Modification Report and Order*, the Commission observed that, in the case of a claim of spot beam coverage infeasibility, the Commission's review of the certification will generally be limited to determining whether it meets with the requirements for a "detailed certification."⁵⁰ We find here that DIRECTV's certification satisfies these requirements, and Gray presents no specific evidence to persuade us to "look behind" the detailed certification.⁵¹ Specifically, DIRECTV certifies that Ashland County ZIP codes 54517, 54806, 54846, 54850, 54855, 54856, and 54861 are not covered by the same spot beam on which WSAW currently is carried. We therefore deny Gray's Petition for market modification with respect to DIRECTV service in these ZIP codes. We find that DIRECTV carriage of the Station in Iron County, and the remaining ZIP codes in Ashland County, is technically and economically feasible.

2. DISH Infeasibility Claim

17. We reject DISH's claim that its carriage of WSAW is infeasible. DISH claims that provision of WSAW to any subscribers in either Iron or Ashland County would be technically and economically infeasible because of the costs associated with changes to customer antennas and/or other equipment to accommodate reception from different orbital locations.⁵² DISH explains that, while WSAW is currently carried on a spot beam that serves both Counties, not all subscribers in those Counties have the necessary equipment to receive WSAW from that spot beam.⁵³ As a result, DISH states that if the market modification were granted it would need to make "operational and billing changes" to manage the differences between customers receiving different services from the same spot beam(s), and/or make equipment changes to allow all affected subscribers to rely on the spot beam carrying WSAW.⁵⁴ As discussed below, we find that DISH has not satisfied its burden to demonstrate that the expenses it describes rise to the level of economic or technical infeasibility.⁵⁵

18. As an initial matter, we note that more than [REDACTED] percent of DISH subscribers in Iron and

⁴⁹ Gray states that "DIRECTV's feasibility determination relies on signal availability standards that apparently are entirely of DIRECTV's creation and are just as entirely undisclosed." Gray Petition for Special Relief at 19. Contrary to Gray's statement, DIRECTV's filing does disclose the standard it relied upon. DIRECTV Response at Ex. 1. Furthermore, the standard used is entirely within DIRECTV's discretion, and it is not a violation of our rules for it to use one developed in-house, provided that the analysis is conducted in substantially the same manner and using substantially the same parameters used to determine the geographic area in which the carrier currently offers stations carried on the spot beam in question. We find that DIRECTV's analysis satisfies this standard and that DIRECTV has provided the required supporting affidavit or declaration under penalty of perjury to support such analysis. See *supra* note 39.

⁵⁰ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10431-32, n.221.

⁵¹ As explained in the *STELAR Market Modification Report and Order*, we will look behind a certification only when we deem it appropriate, such as "when there is evidence that the certification may be inaccurate." *Id.* at 10436, para. 39. Gray provides no such evidence, and, thus, we do not find persuasive its unsupported argument that DIRECTV's claimed coverage areas are geographically without "rhyme or reason" and justify further investigation. Gray Petition for Special Relief at 19.

⁵² DISH Feasibility Certification, *supra* note 3.

⁵³ *Id.*; see also *DISH November 22, 2016 Response* and *DISH December 6, 2016 Response*.

⁵⁴ *Id.*

⁵⁵ As discussed above, for infeasibility claims not based on spot beam coverage a carrier must provide detailed technical and/or economic information to substantiate its claim of infeasibility. See *supra* paras. 11-13.

Ashland Counties who subscribe to local broadcast signals currently receive them from the spot beam that is also carrying WSAW, and have the antenna and equipment necessary to receive WSAW's signal from that spot beam.⁵⁶ This first group of DISH subscribers is thus in the easiest possible position for implementation of a market modification, from the perspective of a DBS provider. DISH nonetheless claims that, even for this first group of subscribers, the proposed market modification would be technically and economically infeasible. On the contrary, we hold that delivery to subscribers like these, who are covered by the relevant spot beam and who have the equipment necessary to receive the relevant signal, is technically and economically feasible. The statutory exception to carriage obligations under STELAR is for a situation in which "it is not technically and economically feasible" for a carrier to provide the signal "*by means of its satellites in operation at the time of the determination.*"⁵⁷ The costs DISH identifies with respect to this first group of subscribers are routine costs of doing business and do not render the market modification infeasible using its satellites currently in operation. DISH states that, to provide the WSAW signal to these subscribers, it would be required to make "operational and billing changes" that include "technical development work for its IT and billing systems in order to distinguish between DISH customers who can receive WSAW and those who cannot" and development of "a method for authorizing receipt of WSAW only for those customers whose current satellite antenna and in-home equipment allow them to see the channel."⁵⁸ DISH further states that it would bear the "direct cost each time a customer in [Iron or Ashland Counties] calls in to ask for information about why she is unable to receive WSAW when her neighbor does."⁵⁹ DISH only partially identifies these costs (those for customer contacts), but does not otherwise identify the remaining costs, such as billing changes.⁶⁰ In any case, it does not explain why these costs would be so substantial that they might rise to the level of infeasibility. Nonetheless, these are the kinds of changes and expenses that will be inevitable in order to implement any satellite television market modification, even the most basic, and Congress adopted a satellite market modification process despite the need for satellite carriers to implement such changes. If we were to find that these kinds of "operational and billing change" costs were sufficient to render a market modification technically or economically infeasible, the exception would swallow the rule.

19. DISH also explains that it has a second group of customers in Iron and Ashland Counties who, though their households are covered by the relevant spot beam, do not currently receive service from it. Although it is not entirely clear from DISH's filings, it appears that this is largely because subscribers to DISH [REDACTED] local service in Iron and Ashland Counties receive their local broadcast signals from a spot beam on a different satellite in a different orbital location from the one that carries WSAW.⁶¹ Some subscribers apparently also rely on equipment that would not be able to process any video signals from the spot beam carrying WSAW, even if their dish antenna was reoriented.⁶² Other subscribers may not receive service from the spot beam because of their service package, and some currently may not be able to receive the Station's signal due to some combination of these factors.⁶³

⁵⁶ This is because the Duluth-Superior DMA [REDACTED] local signals (*i.e.*, the local signals currently received by this group of subscribers in Ashland and Iron counties) are carried on the same spot beam as the Wausau-Rhinelanders DMA [REDACTED] local signals (*i.e.*, the spot beam on which WSAW is carried), and subscribers to the Duluth-Superior [REDACTED] signals already have correctly oriented antennas and the correct equipment to receive them. DISH Dec. 6, 2016 Response at 3-4.

⁵⁷ 47 U.S.C. § 338(l)(3) (emphasis added).

⁵⁸ DISH Dec. 6, 2016 Response at 2.

⁵⁹ *Id.*

⁶⁰ DISH Dec. 5, 2016 Response at 6.

⁶¹ *Id.* at 2-4.

⁶² *Id.* at 3-4.

⁶³ *Id.*

According to DISH, in order to receive WSAW, these subscribers would need a new set top box or boxes, a new dish antenna or antennas, reorientation of their current dish antenna, or in some cases more than one of these changes. DISH argues that the expense of truck rolls, and in some cases new equipment, for those subscribers renders the market modification as a whole infeasible.⁶⁴

20. We find that the potential costs DISH identifies for providing the small number of subscribers in this second group with access to WSAW do not amount to technical or economic infeasibility. The [REDACTED] DISH local-into-local subscribers at issue are served by the relevant spot beam, even if they are not currently able to access programming from that spot beam. Based on the information provided by DISH, we find that the costs associated with providing those customers who do not currently have access to the spot beam with such access are low enough that serving them is not technically or economically infeasible. Indeed, DISH estimates that, even for the few customers requiring the most expensive upgrades, the total cost would be [REDACTED].⁶⁵ Nonetheless, we recognize that a service change, particularly one involving a service visit and potential new equipment, could create some burden on the few subscribers in this second group. Therefore, if DISH ultimately carries WSAW after the grant of this Petition, it must do so immediately for subscribers in the first group and new subscribers, but may roll out service at a more measured, non-dilatory pace to existing subscribers in this second group.⁶⁶

B. STATUTORY FACTORS

1. Consideration of Multicast Programming

21. As a threshold matter, we determine that we will consider all of the relevant programming provided via WSAW's broadcast signal, including programming provided via multicast streams, when applying the statutory market modification factors. As explained below, we make this finding because all of the programming offered on WSAW would be eligible for carriage via retransmission consent throughout the modified market.⁶⁷

22. Gray argues that programming carried on its subchannels, specifically the subchannel offering a simulcast of WZAW-LD, should be considered when determining whether or not to grant its Petition.⁶⁸ Gray points out that, although the Commission has not previously considered the programming on a station's secondary streams when considering the station's Petition for market modification, nothing in the Communications Act prohibits the Commission from considering this relevant programming. Section 338(l)(2)(B) states that the Commission "shall afford particular attention

⁶⁴ The highest per-subscriber one-time cost estimate DISH identifies is approximately [REDACTED], which would apply only to the even smaller subset of subscribers who need both a new antenna and multiple new set top boxes. The one-time per-subscriber cost could be as low as [REDACTED] for some subscribers, even with a service visit. DISH Dec. 5, 2016 Response (unredacted). This compares to annual per-subscriber revenue exceeding \$1,000. DISH Dec. 6, 2016 Response. By DISH's own estimates, this will be a one-time total cost of less than [REDACTED], as compared to DISH annual revenue exceeding \$15,000,000,000. These costs are not amortized, do not reflect DISH's need to periodically upgrade equipment regardless of the Bureau's action in this proceeding, and do not reflect [REDACTED]. As a result, they are significant overestimates, but even taken at face value we find that they do not rise to the level of technical or economic infeasibility, when considered in light of both DISH's per subscriber and gross revenues.

⁶⁵ DISH Dec. 6, 2016 Response at 1.

⁶⁶ To be clear, DISH must ensure that any new customers in Iron and Ashland Counties who subscribe to local-into-local service after the grant of this market modification are capable of receiving all local signals DISH has the right to provide immediately upon beginning service, including WSAW if it is carried after grant of this Petition.

⁶⁷ 47 CFR 76.64(j) (noting that retransmission consent agreements may cover "the entire signal or any portion of the signal" of a television broadcaster).

⁶⁸ Gray Petition for Special Relief at 12.

to the value of localism by taking into account . . . whether the television station provides coverage or other local service to such community.”⁶⁹ Notably, Section 338 does not ask whether the primary channel of the television station provides such local coverage.⁷⁰ Gray further argues that consideration of this programming is appropriate because grant of its proposed market modification would make “programming on WSAW-TV’s main and multicast channels available to satellite viewers in” Iron and Ashland Counties.⁷¹ It argues that, because a market modification changes the “local market” for a station, all programming carried by that station is eligible for carriage within the modified local market, not merely the programming carried on the station’s primary stream.

23. No other parties dispute Gray’s legal analyses regarding the relevance of multicast programming to its Petition. We find Gray’s arguments persuasive. First, we note that, as a general matter, all of the multicast streams broadcast by a station are eligible for carriage throughout its market,⁷² and we find that this eligibility is unchanged in an expanded market created via the market modification process. STELAR modified Section 338 of the Communications Act to give the Commission authority “with respect to a particular commercial television broadcast station” to “include additional communities within its local market.”⁷³ Section 76.59 of the Commission’s rules states that the Commission “may deem that the television market . . . of a particular commercial television broadcast station should include additional communities within its television market.”⁷⁴ Granting a market modification, therefore, effects a change to the market of an entire station, not just of a particular stream or signal provided by that station,⁷⁵ and once we have done so the statutory copyright license applies to “a primary transmission of a television broadcast station” which includes “the primary stream and any multicast streams transmitted by the station.”⁷⁶

24. Second, we find that the content on all of a petitioning station’s multicast streams should be considered when analyzing a market modification petition. If Gray elects retransmission consent, as it has indicated it plans to do,⁷⁷ it could negotiate for carriage of any or all of WSAW’s programming

⁶⁹ 47 U.S.C. § 338(l)(2)(B).

⁷⁰ Gray Dec. 2, 2016 Response at 3-4 (internal citations and emphases omitted).

⁷¹ Gray Petition for Special Relief at 3.

⁷² See *supra* note 65.

⁷³ 47 U.S.C. § 338(l)(1).

⁷⁴ 47 CFR § 76.59.

⁷⁵ The “no distant where local” rule, prohibiting the importation of an out-of-market network station when there is a local station of the same network available, does not appear to apply in this situation. 17 U.S.C. § 119(a)(3). The content on WSAW’s subchannel 7.3 is, Petitioner notes, identical to that broadcast by WZAW, an out-of-market network broadcast station. Gray Dec. 2, 2016 Response at 5. Gray is not, however, proposing to seek carriage of WZAW. It indicates that, in the course of retransmission consent negotiations involving carriage of WSAW’s signal into Iron and Ashland Counties, it will seek carriage of one or more of the digital subchannels broadcast by WSAW, which will (after the grant of the instant Petition) be a local broadcaster. Gray Dec. 2, 2016 Response at 5. As discussed above, WSAW has authority under the Act and our rules to offer retransmission consent, within its local market, for any and all programming it broadcasts on any digital subchannel. Neither the Act nor our rules limit this right based on the content aired on the subchannel. See *supra* note 65.

⁷⁶ 17 U.S.C. § 119(d)(4); 17 U.S.C. § 111(f)(1) (defining “primary transmission” as “a transmission made to the public by a transmitting facility whose signals are being received and further transmitted by a secondary transmission service, regardless of where or when the performance or display was first transmitted. In the case of a television broadcast station, the primary stream and any multicast streams transmitted by the station constitute primary transmissions.”). See also Gray Dec. 2, 2016 Response at 2-3.

⁷⁷ Gray Dec. 2, 2016 Response at 1.

streams.⁷⁸ As a result, all of the programming broadcast by WSAW, including that on all of its multicast streams, is potentially available to subscribers in Iron and Ashland Counties. Admittedly, we cannot know at this juncture whether DISH and/or DIRECTV will agree to carry any or all of WSAW's multicast streams. Notwithstanding this uncertainty, we will consider the full range of WSAW's programming, including programming currently carried on programming streams other than the primary stream, when analyzing the statutory factors.⁷⁹

2. Analysis of Individual Statutory Factors

25. We first find that both Iron and Ashland Counties are “orphan counties.” The approach we take in our analysis of the statutory factors, accordingly, reflects the unusual fact patterns present in an orphan county scenario. Both Counties are assigned to the Duluth-Superior DMA, which includes seven Minnesota counties, five Wisconsin counties, and one Michigan county; and is served almost exclusively by stations licensed to communities within the state of Minnesota.⁸⁰ The Petitioner argues that Iron and Ashland Counties are currently underserved by the broadcast stations in the Duluth-Superior DMA, due to those stations' focus on news and programming information of interest to Minnesotans.⁸¹ This claim is supported by several comments filed in the docket by county residents and their representatives.⁸² The Opposition responds that Iron and Ashland Counties are not orphan counties “in the traditional sense,” because the Duluth-Superior DMA includes other Wisconsin counties and was named by Nielsen to reflect this; and the stations assigned to this DMA “provide extensive coverage of Wisconsin politics, news, sports, weather, and other community events and issues of local importance.”⁸³ Although we recognize that labeling Iron and Ashland Counties as orphan counties is a close call because the DMA in

⁷⁸ See *supra* note 65. If electing must carry, on the other hand, a broadcaster may designate only one of its programming streams as its “primary video” stream entitled to mandatory carriage. See *Carriage of Digital Broadcast Signals, Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, First Report and Order and Further Notice of Proposed Rule Rulemaking, FCC 01-22, 16 FCC Rcd 2598, 2622 para. 57 (2001) (“[W]e conclude that “primary video” means a single programming stream and other program-related content ... [I]f a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage. The broadcaster must elect which programming stream is its primary video, and the cable operator is required to provide mandatory carriage to only such designated stream.”). The Commission subsequently affirmed this conclusion on reconsideration. *Carriage of Digital Broadcast Signals, Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, 4532 para. 33 & 4537 para. 44 (2005).

⁷⁹ We observe that this question of whether we should consider the programming offered on a Petitioner's secondary streams in the context of a market modification request is notably distinct from the one raised in the 2013 *Dayton Ohio Market Modification* proceeding. *Petition for Modification of the Dayton, OH Designated Market Area with respect to Television Station WHIO-TV, Dayton, OH*, Memorandum Opinion and Order, 28 FCC Rcd 16011 (MB 2013) (*Dayton*). In general, the Commission is reluctant to add an out-of-market affiliate to an in-market affiliate's market. *Id.* at para. 26. In *Dayton* the “in-market affiliate” was broadcast on the secondary stream of a low power station (meaning it had limited or nonexistent carriage rights to be disrupted by the entrance of a second affiliate), and offered no unique news content, so the Bureau declined to take it into account in the application of the statutory factors. *Id.* In *Dayton*, the Bureau did not indicate that the content's presence on a secondary stream rendered it irrelevant; instead, its carriage on a low power broadcast station and its lack of unique news content were the primary basis for the Bureau's action.

⁸⁰ There is one station in the Duluth-Superior DMA that is licensed to a Wisconsin community located in the suburbs of Duluth, MN. It did not object to the Petition. WDIO/KQDS Opposition at 5-6.

⁸¹ Gray Petition for Special Relief at 1-3, 7-9.

⁸² Comments were filed by Iron County Clerk Michael Saari and United States Senator Ron Johnson. Clerk Michael Saari Comments (Sept. 22, 2016); Senator Ron Johnson Comments (Sept. 27, 2016).

⁸³ WDIO/KQDS Opposition at 5-6.

which they are located already includes Wisconsin counties and stations, we agree with the Petitioner that the Counties nonetheless should be considered orphan counties. We find that the Counties are underserved by in-state programming, and both are counties “in one state [] assigned to a neighboring state’s local television market and, therefore, satellite subscribers residing in [those counties] cannot receive some or any broadcast stations that originate in-state.”⁸⁴

26. With the STELAR’s revisions to the market modification process, and its addition of a satellite market modification process, Congress intended to address orphan county situations like these. Indeed, the legislative history observes that “many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances,” may “lack access to local television programming that is relevant to their everyday lives” and instructs us to “consider the plight of these consumers when judging the merits of a [market modification] petition . . . , even if granting such modification would pose an economic challenge to various local television broadcast stations.”⁸⁵ As we observed in the *STELAR Market Modification Report and Order*, “each petition for market modification will turn on the unique facts of the case,” and there is no single universal way to weigh the statutory factors.⁸⁶ We analyze these factors here in light of the importance Congress placed on addressing orphan counties’ inability to receive in-state programming. We believe this is necessary in order to best effectuate the goals of the STELAR.⁸⁷

⁸⁴ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10408, n.5.

⁸⁵ *Senate Commerce Committee Report* at 11. The Opposition claims that expansion of this market will indeed pose an economic challenge to Duluth-Superior stations. WDIO/KQDS Opposition at 5-6. First, we are unpersuaded that this is relevant under Section 338, as the legislative history indicates that it was not Congress’s intent to shield stations from competition. *Id.* Second, we think that the Opposition has substantially overstated the extent of likely audience diversion. We note that by granting this market modification, we are adding an in-state station to the new communities but are not displacing the long-established local service provided by the same-network affiliates currently serving the communities. The Opposition argues that if the Petition is granted, and the Duluth stations lose viewership to WSAW, the Duluth stations “may be forced to reassess the allocation of resources for local news coverage to areas in which viewership remained stronger.” *Id.* at 17-18. As broadcasters licensed to serve these communities in the public interest, we expect that the Duluth stations will continue to provide valuable local service regardless of the competition they face. Furthermore, there is no evidence that competition among providers is likely to harm consumers in this situation. Finally, the Opposition also argues that the modification could cause the Duluth Fox affiliate in particular to “lose significant leverage in its ability to gain carriage, and to negotiate fair carriage agreements.” *Id.* at 18. We are skeptical about this claim. The modification affects two rural counties on the edges of the Duluth DMA. It appears unlikely that a DBS provider would drop a Duluth network affiliate, losing service for subscribers in the city of Duluth itself, just because two of the 12 counties in the DMA have an alternative. Neither WSAW nor the Fox programming offered on its secondary stream can serve as a replacement for the Duluth network affiliates throughout the Duluth market.

⁸⁶ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421, para. 18.

⁸⁷ We will weigh the factors in the same manner in the event of any future cable market modification petition regarding communities within an orphan county. By adding the new statutory factor number three to both new DBS modification processes and existing cable modification processes, Congress made clear that we should do so. *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 17 (“the STELAR added a fifth factor (inserted as the new third statutory factor) for both cable and satellite to ‘promote consumers’ access to television broadcast station signals that originate in their State of residence.”). We note, however, that the impact may be different even in situations where the fact patterns are otherwise similar, and this differing impact may lead us to a different result. Although cable operators are not required to carry duplicating stations or more than one local station affiliated with a particular network, if a cable system declines to carry duplicating stations, it must carry the station closest to the principal headend of the cable system, even if that station is from another state. See 47 CFR § 76.56(b)(5). By contrast, in the satellite carriage context, a satellite carrier must carry two stations affiliated with the same network if they are from different states, see 47 U.S.C. § 338(c)(1); 47 CFR § 76.66(h)(1), and otherwise may select which duplicating station or network affiliate in a market it will carry. See 47 CFR § 76.66(h)(2)-(3). Thus, the potential for market disruption of long-established network stations is lower in the satellite context, and we are

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27. In particular, we find that in-state programming is a type of “local” service.⁸⁸ Unlike in a traditional market modification process, in which a station might demonstrate a local connection through geographic proximity tests, in-state stations are more likely to demonstrate that they are “local” through evidence showing they seek to provide a community with access to news, politics, sports, emergency and other programming specifically related to their home state. Heavy reliance on geographic proximity tests in the context of an orphan county fact pattern seems especially inappropriate given the “remote geographic location of orphan counties”⁸⁹ and the fact that they are by definition on the outskirts of a petitioner’s home state. Accordingly, we find that tests based on geographic proximity, which have historically been considered important for demonstrating a market nexus between a station and a community, are of significantly reduced relevance in the orphan county context. Similarly, we would anticipate that historic carriage of a petitioner station would be less common and its viewer ratings would be lower in an orphan county than we have found in prior successful market modification proceedings.⁹⁰ To hold orphan county market modification petitions to these pre-STERAR standards would frustrate the will of Congress, which instructed us to “consider the plight” of viewers in these counties. Therefore, in line with Congress’s addition of the new third statutory factor, in orphan county situations we will give substantial weight to the in-state programming a petitioner proposes to bring to the orphan county when determining whether a nexus to a new community has been demonstrated, and will consider the other factors, when they apply, as enhancements to a petitioner’s case.⁹¹

28. Applying this framework to the instant situation renders a close case. As discussed below, we ultimately grant the modification (subject to the limitations discussed above in the feasibility section) despite the limited amount of unique in-state and other local programming offered by WSAW. We do so largely because of the value of that programming to Wisconsin residents, as discussed below, as well as the enhancements to WSAW’s case that we find in our review of the non-programming factors.

29. *Historic Carriage.* The first factor we must consider is “whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; or have been historically carried on the satellite carrier or carriers serving such community.”⁹² WSAW has been carried in various parts of Ashland County since 1982 (Butternut, Glidden, and Mellen) and in Mercer, Iron County, since 1991.⁹³ WZAW,⁹⁴ and two other stations in the

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therefore more likely, even if only marginally more likely, to grant DBS orphan county market modification petitions.

⁸⁸ See *Senate Commerce Committee Report* at 15 (“The Committee intends that the FCC’s report will interpret local programming to include not only television programming (in particular news, sports, weather, and other programming containing content relevant to a consumer’s daily life) originating from and about the DMA in which a consumer resides, but also television programming originating from and about the State in which a consumer resides.”).

⁸⁹ *Id.* at 10418, para. 15.

⁹⁰ See, e.g., *Tennessee Broadcasting Partners*, 23 FCC Rcd 3928 (MB 2008). NB: like all pre-STERAR market modification cases, *Tennessee* is a cable case, not a DBS case. The most important difference, however, is that Petitioner’s case involves orphan counties, not that the markets being modified are satellite rather than cable markets.

⁹¹ In contrast, in market modification proceedings that do not involve the addition or deletion of an in-State broadcaster, the Media Bureau has found that the third statutory factor is inapplicable. See *COXCOM, LLC*, 30 FCC Rcd 10978, 10999, para 46 (MB 2015) (“The mere possibility that a cable system might carry in-state programming in place of the deleted station is not sufficient to make use of the in-state enhancement factor.”).

⁹² 47 U.S.C. § 338(l)(2)(B)(i).

⁹³ Petition at Ex. F. Gray maintains that data from AP Television and Cable Factbooks demonstrate that WSAW has long been carried on cable systems serving portions of Ashland and Iron Counties, in addition to several other stations assigned to the Wausau-Rhineland DMA. *Id.* at 10-11. In particular, the Petitioner claims that, currently,

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Wausau-Rhineland DMA (WJFW and WYOW), are also currently carried in Glidden, Ashland County and Mercer, Iron County.⁹⁵ We give no weight to the Opposition's point that WSAW has no history of satellite carriage in Iron and Ashland Counties, given that DBS providers are generally authorized to carry broadcast stations only in their local markets.⁹⁶ It would have been extremely difficult for WSAW, assigned to the Wausau-Rhineland DMA, to have obtained satellite carriage in the Duluth-Superior DMA prior to the advent of satellite market modification. As noted above, we would expect historic carriage to be uncommon in orphan county situations. And indeed, the historic carriage demonstrated by Petitioner is minimal.⁹⁷ Nonetheless, as we also note above, we consider historic carriage an enhancement factor in the orphan county context. That WSAW has any historic carriage at all is noteworthy, and, given the level of carriage here, weighs slightly in favor of our grant of the Petition.

30. *Local Service.* Second, we consider "whether the television station provides coverage or other local service to the community."⁹⁸ As explained above, we find that distance tests such as contour maps are not determinative in the consideration of a market modification request involving an orphan county, though they may enhance a Petitioner's case.⁹⁹ In this case, we find that overall geographic proximity measures do not enhance the Petitioner's case, and we thus consider them neutral.¹⁰⁰ Instead, we rely on

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cable provider Packerland Broadband carries WSAW, WZAW, WJFW-TV (WJFW), and WYOW(TV) (WYOW) on its systems serving the Glidden and Butternut areas of Ashland County; Petition at 10-11, and that Karban TV Systems carries WSAW, WZAW, and each of Wausau's other Big Four affiliates on its Mercer, Iron County system. In addition, Gray claims that "Ashland county cable operators have consistently carried WSAW-TV to Ashland County viewers for decades," and "some Ashland County systems have carried WSAW-TV since at least 1985." Petition at 11. With regard to Iron County, Gray claims that Karban TV Systems has carried WSAW in Mercer since 1991. *Id.*

⁹⁴ As discussed above, WSAW carries the same content as WZAW's broadcast signal on one of its secondary multicast streams. *See supra* para. 22.

⁹⁵ Petition at Ex. F. Due to a lack of sufficient data, we do not credit the Petitioner's other claims.

⁹⁶ There are narrow circumstances under which a DBS provider may receive a statutory copyright license for the importation of out-of-market (or "distant") signals. 17 U.S.C. § 119(a)(3).

⁹⁷ WDIO/ KQDS argue that the Petition's evidence of historic carriage does not demonstrate a sufficient market nexus to justify modification of its satellite market to include all of Ashland and Iron Counties. WDIO/KQDS Opposition at 7-9. WDIO/KQDS assert that the Commission has, in previous cable market modification proceedings, refused to adopt a presumption that adding a community to a station's market would justify adding an entire county to the market. *Id.* at 8. The Opposition suggests that in the satellite carriage context, the petitioner must demonstrate that it has a market nexus with each part of a county, and argues that the Petitioner has failed to do this. *Id.* at 7-9. The Opposition's argument fails to take into account that, in satellite market modifications, a county considered as a whole (and not the individual communities located therein) is subject to modification. *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10410 para. 4.

⁹⁸ 47 U.S.C. § 338(l)(2)(B)(ii). To show that a station provides coverage or other local service to the cable communities, parties must provide "noise-limited service contour maps ... delineating the station's technical service area and showing the location of the cable system headends or satellite carrier local receive facilities and communities in relation to the service areas." 47 CFR § 76.59(b)(2). A station's broadcast of programming specifically targeted to the community at issue may also serve as evidence of local service. *See, e.g., Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, para. 24 (Cable Services Bureau 1999).

⁹⁹ *See supra* paras. 26-27.

¹⁰⁰ Petitioner argues that WSAW's signal covers portions of the Counties at issue, thus satisfying the test employed by the Commission in evaluating signal coverage. Petition at 11, 12. (citations omitted). Gray also maintains that WSAW and WZAW provide "significant" local service and programming that covers events and issues of concern to Ashland and Iron Counties. *Id.* at 12 & Ex. H. Finally, Gray argues that, although the Commission typically considers the distance between the Station and communities at issue as compared with the other stations in the communities' DMA, this metric is of limited utility in this matter because no stations in the Wausau-Rhineland or the Duluth-Superior DMAs share a close proximity to the Counties. Petition at 14 & Ex. K. (citations omitted). The

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our assessment of whether the programming offered by WSAW, including that offered on its multicast streams, meets the informational and service needs of the local residents of Ashland and Iron Counties.¹⁰¹ In doing so, we are mindful of Congress's intention that "local" programming under this factor should, particularly in the case of orphan counties like Iron and Ashland Counties, be interpreted to include all programming "originating from and about" their state.¹⁰² We find that all programming carried on WSAW and specifically targeted to the Counties is relevant, including news programming on WSAW's primary and multicast streams and Green Bay Packers NFL games available on a multicast stream. The Commission has long recognized the importance to subscribers of having viewing access to in-state sports.¹⁰³ We find that WSAW carries local programming of interest to the communities, demonstrating a local connection.¹⁰⁴ We also give weight to the resident and representative comments submitted in

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Opposition argues that WSAW's over-the-air signal covers no more than a *de minimis* portion of the area and population of Ashland and Iron Counties. The Opposition also argues that the distance between Wausau and the population areas within Ashland and Iron Counties far exceeds distances the Commission has previously found to demonstrate that an area was not part of a station's local market. WDIO/KQDS Opposition at 14 (citations omitted). Particularly given the reduced importance of these proximity-related considerations in the orphan county context, and in light of the equally valid arguments on both sides of the question, we give these matters no weight in our carriage decision.

¹⁰¹ We note that, contrary to the claims of the Opposition (WDIO/KQDS Opposition at 12), the amount of local service provided by other stations is not relevant to our consideration of this factor, but rather comes into play in our consideration of factor four below. We have previously concluded that what is now the fourth factor of market modification assessments, which concerns local programming provided by other stations, was intended to "enhance a station's [market modification] claim where it could be shown that other stations do not serve the communities at issue." *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526, at para. 13 (Cable Services Bureau 1997). However, as explained under the fourth prong below, in cases where other stations do serve the communities, "this factor neither weighs against nor in favor of [Petitioner's] modification request." *Dayton*, 28 FCC Rcd at 16019. As such, any demonstration by the Opposition that their stations offer the Counties at issue access to local programming has no bearing on the weight of this factor in our analysis.

¹⁰² *Senate Commerce Committee Report* at 11, 15 (explaining that the "many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances, have expressed concerns that they lack access to local television programming that is relevant to their everyday lives" and directing the Commission to interpret local programming to include "not only television programming [. . .] originating from and about the DMA in which a consumer resides, but also television programming originating from and about the State in which a consumer resides").

¹⁰³ See, e.g., *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473, 535, para. 133 ("[S]ports fans believe that there is no good substitute for watching their local and/or favorite team play an important game.").

¹⁰⁴ Gray explains that WSAW's primary stream provides "significant" local service and programming that covers events and issues of concern to Ashland and Iron Counties, including 186 stories on "breaking news, local sports, economic matters, and political issues" since 2014. *Id.* at 12 & Ex. H. The Petitioner also explains that its third multicast stream provides news concerning the Counties in its weeknight news program, and Green Bay Packers football games that are currently unavailable on local broadcast signals in Iron and Ashland Counties. Petitioner at 3, 12. The Opposition argues that it is unclear from the exhibits submitted by Gray in support of these claims that WSAW produced and delivered any on-air coverage of issues arising in Ashland and Iron Counties, but Gray has clarified that the stories mentioned were delivered on-air. WDIO/KQDS Opposition at 11; Gray Letter (Jan. 4, 2017). The Opposition also maintains that the Petitioner's claims are further weakened by weather maps submitted in support of its modification request, which it maintains are significantly less useful to residents in the Counties because the Counties are not adequately visible on the weather maps. WDIO/KQDS Opposition at 12. These arguments do not weaken Gray's central case, which is that WSAW provides a significant amount of local programming, and unique local programming in the form of professional football games of the in-state sports team, the Green Bay Packers.

support of the Petition.¹⁰⁵ As the Commission noted in the *STELAR Market Modification Report and Order*, “local government and consumer comments in a market modification proceeding can help demonstrate a station’s nexus to the community at issue.”¹⁰⁶ Overall, we find that this factor weighs in favor of a grant of the Petition.

31. *Access to In-State Stations.* The third, new factor we consider is “whether modifying the local market of the television station would promote consumers’ access to television broadcast station signals that originate in their State of residence.”¹⁰⁷ This factor is satisfied by introduction of an in-state station to a community, but weighs more heavily in favor of modification if the petitioner shows the involved station provides programming specifically related to subscribers’ state of residence, and may be given even more weight if subscribers in the new community have little (or no) access to such in-state programming.¹⁰⁸ WSAW has a license located within the Counties’ home state and provides programming addressing issues related to the State of Wisconsin that is currently unavailable¹⁰⁹ to Ashland and Iron County residents. In response to the Opposition’s argument¹¹⁰ that this factor should not enhance the Petitioner’s modification request, we note that the *STELAR Market Modification Report and Order* makes clear that an enhancement may be granted on a mere showing that the involved station is an in-state station, and that the factor weighs much more heavily when there is a showing, as in this case, that the home state station is providing unique programming.¹¹¹ We find that a market modification would promote the Counties’ access to an in-state television broadcast signal and enhance viewers’ access to in-state local programming, and this new third factor accordingly weighs heavily in favor of granting

¹⁰⁵ Michael Smith Comments at 1; Donald E. Peterson Comments at 1; Donald B. Mowbray Comments at 1; Gerold Hammen Comments at 1; Michael Saari Comments at 1; Senator Ron Johnson Comments at 1 (noting that he has also received comments in support of such a modification from residents of the counties).

¹⁰⁶ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

¹⁰⁷ 47 U.S.C. § 338(l)(2)(B)(iii).

¹⁰⁸ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

¹⁰⁹ Petitioner has submitted evidence of coverage of local and state politics and economic matters, as well as local and state sporting events not otherwise available to Ashland and Iron County. Although WDIO/KQDS indicates that they provide programming that covers events and issues of concern to viewers in Ashland and Iron Counties and have “ample motivation and ability to cover” local political events, the parties submitted no evidence that they too provide similar coverage of political events, economic matters, and sports; and concede that a market modification would provide the Counties with additional Green Bay Packers games. Petition at 11-14 & Ex. H; WDIO/KQDS Opposition at 2, 12-14.

¹¹⁰ The Opposition argues that this factor should serve only as an enhancement to a modification request after the other factors are satisfied. WDIO/KQDS Opposition at 14. The Commission declined to adopt this approach in the *STELAR Market Modification Report and Order*. It explained that while satisfaction of the in-state factor was “not universally more important than any of the other factors,” “its relative importance will vary depending on the circumstances in a given case.” *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18. As discussed above, in the case of orphan counties, its importance is significantly greater. See *supra* para. 26. The Opposition further asserts that STELAR was intended to address a lack of local programming, and this is not an issue for Ashland and Iron Counties. WDIO/KQDS Opposition at 14. Again, we disagree, both substantively because of the unique programming WSAW will provide, and legally. The Commission has stated that the new third market modification factor was not intended solely to address a lack of local programming, but to also address the inability of orphan counties to receive sufficient in-State programming, even when some is already available. *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421, para. 18.

¹¹¹ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421, para. 18 (“a petitioner will be afforded credit for satisfying this factor simply by showing that the involved station is licensed to a community within the same state as the new community...this factor may be found to weigh more heavily in favor of modification if the petitioner shows the involved station provides programming specifically related to subscribers’ state of residence, and may be given even more weight if such subscribers in the new community had little (or no) access to such in-state programming.”).

the petition.

32. *Other Local Stations.* Fourth, we consider “whether any other television station that is eligible to be carried by a satellite carrier in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community.”¹¹² The Commission has held that the fourth factor may serve to enhance the petitioner’s claim if it is demonstrated that there is no other station serving the Counties at issue, but that the factor will neither weigh in favor of or against a modification request if another station serves those counties. Because other stations, including WDIO and KQDS, do provide the communities with coverage of local issues,¹¹³ we find that this factor weighs neither against nor in favor of WSAW’s modification request, and consider it neutral.¹¹⁴

33. *Viewing Patterns.* Finally, we consider “evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.”¹¹⁵ As discussed above, in the orphan county context we would expect viewer ratings to be lower.¹¹⁶ And indeed, the viewer ratings demonstrated by Petitioner for Iron and Ashland Counties are low. Nonetheless, as we also note above, we consider viewer ratings an enhancement factor in the orphan county context. That WSAW has any measurable ratings at all is noteworthy, and weighs slightly in favor of the grant.¹¹⁷

34. *Conclusion.* The issue before us is whether to grant Petitioner’s request to modify the local satellite carriage market of WSAW—of the Wausau-Rhineland DMA—to include Wisconsin’s Ashland and Iron Counties, which are currently assigned by Nielsen to the Duluth-Superior DMA.¹¹⁸ As noted above, this is a close case. Section 338(l) permits the Commission to add or exclude communities from a station’s local television market to better reflect market realities and to promote access to local programming from broadcasters located in their State.¹¹⁹ Under this statutory provision, the Commission must afford particular attention to the value of localism.¹²⁰ We are persuaded by the second and (new) third factors that a sufficient market nexus exists between WSAW and Ashland and Iron Counties, and

¹¹² 47 U.S.C. §§ 338(l)(2)(B)(iv).

¹¹³ WDIO/KQDS Opposition at 12. The Petitioner maintains that the communities receive no “significant coverage of local issues” from other stations currently in the DMA and that it is unaware of a station that provides as much or more service than WSAW. Petition at 15. The Petitioner asserts that the Counties currently lack access to nearly all local programming produced by the Wisconsin-licensed television stations. Petition at 14. According to Gray, there is only one Wisconsin station in the Duluth-Superior DMA, located in a suburb of Duluth. *Id.* The Opposition argues that the Counties are well served by extensive coverage of events in the Counties, including both WDIO’s and KQDS’s reports on weather and politics, which the Opposition maintains are far more frequent and more in-depth than those provided by WSAW. WDIO/KQDS Opposition at 12-14.

¹¹⁴ WDIO/KQDS Opposition at 12-13.

¹¹⁵ 47 U.S.C. §§ 338(l)(2)(B)(v).

¹¹⁶ See *supra* paras. 26-27.

¹¹⁷ The Petitioner argues that WSAW achieves more than sufficient viewership in the Counties to meet the “measurable viewing audience” threshold, citing Nielsen ratings that it claims are particularly significant because the Station is unavailable from DBS satellite operators, which together control roughly 42 percent of the households in the Duluth-Superior DMA. Petition at 17-18. The Opposition argues that WSAW’s viewership is far below the “moderate” level required to justify addition of the entirety of both Counties to WSAW’s local market, but its argument is based on analysis of pre-STEELAR, non-orphan county cases.

¹¹⁸ Gray Petition for Special Relief at 1-2.

¹¹⁹ *STEELAR Market Modification Report and Order*, 30 FCC Rcd at 10412-13, para. 7.

¹²⁰ *Id.*

conclude that the first and fifth factors enhance the request under the specific facts of this proceeding. We find that the fourth factor is neutral in this instance. We accordingly grant Gray's request for market modification, and order Ashland and Iron Counties to be added to the local market of WSAW on both DISH and DIRECTV (with the exception of the seven listed Ashland County ZIP codes).

35. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.59 of the Commission's rules, 47 CFR § 76.59, that the captioned petition for special relief (MB Docket No. 16-293, CSR-8926-A), filed by Gray Television, LLC, **IS GRANTED IN PART**, with regard to DIRECTV, for Iron County and the following five ZIP codes in Ashland County: 54514, 54527, 54546, 54557, and 54559; and, with regard to DISH, for both Iron and Ashland Counties. In all other respects, Gray Television, LLC's petition **IS DENIED**.

36. This action is taken pursuant to delegated authority by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief,
Media Bureau